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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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DISTRICT OF NEW MEXICO

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JAMES SEABA and CORY PHILLIPS,

Plaintiffs,

v.

MESOSYSTEMS TECHNOLOGY, INC.,

Defendant.

NO. 02-CV-103 LH/RHS

**DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO
DEFENDANT'S AMENDED MOTION TO COMPEL**

Defendant, MesoSystems Technology, Inc. ["MesoSystems"], by and through its attorneys of record, Bauman, Dow, McIntosh & León, P.C. (Alberto A. León and Darci A. Carroll) respectfully replies to Plaintiffs' Response in Opposition to Defendant's Amended Motion to Compel (the "Amended Response") as follows.

I. Nancy Seaba's refusal to discuss conversations with the Modrall Firm.

In response to MesoSystems' request that Nancy Seaba testify as to the substance of conversations she had or witnessed involving her husband's attorney regarding her deposition or this lawsuit, Plaintiffs claim that any conversations are attorney-client privileged. Mr. Artuso asserts that Nancy Seaba hired his firm from "before the beginning of the lawsuit." Plaintiffs and Plaintiffs' counsel have not produced any evidence of such an unusual representation arrangement.

In the Amended Response, Plaintiff's counsel fault's MesoSystems' counsel for not interrogating Nancy Seaba further regarding the fact or scope of the Modrall Firm's representation of Nancy Seaba. However, Mr. Artuso, an attorney with the Modrall Firm,

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unambiguously represented to MesoSystems' counsel the "fact and scope of representation" in question and instructed his client not to answer any questions. Mr. Artuso further agreed that his instruction regarded "any conversations that you [Mr. Artuso] ever had with her [Nancy Seaba]." See Nancy Seaba Dep p. 6:4 – 7:16 attached as **Exhibit B** to Defendant's Amended Motion to Compel. MesoSystems counsel fully explored Nancy Seaba's claim of privilege, respected Plaintiff's attorney's objection and instruction to Nancy Seaba not to answer further questions on the matter, and preserved the issue to be resolved by the appropriate authority, this Court.

Plaintiffs go on to argue that because this case is a matter of "common interest with her husband and Dr. Phillips," Nancy Seaba is entitled to assert attorney-client privilege for communications between Plaintiffs and their counsel for which she was present. This argument contradicts Plaintiff's position on the common interest protection raised earlier in this litigation. Magistrate Schneider ruled and Magistrate Scott agreed, that where two individuals were present at a meeting with their attorney, one was a representative of a party to a lawsuit and the other was not and the two were distinct under the law, "the fact they have the same attorney, doesn't give them both the attorney-client privilege for that particular meeting," and Plaintiff's counsel agreed. See Deposition of Ned Godshall taken April 1, 2003, p. 31:11-20 attached as **Exhibit A**. In the instant situation, Phillips and Seaba are parties to this lawsuit, but Nancy Seaba is not. The basis of Plaintiffs claims is their employment relationship with MesoSystems and alleged relationship with MesoFuel, neither of which apply to Nancy Seaba. The fact that the Plaintiffs and Nancy Seaba supposedly have the same attorney does not extend the

attorney-client privilege to Nancy Seaba when all are present with their mutual attorney, as Plaintiffs have previously asserted in this case and Magistrate Schneider and Scott ruled.

Parties asserting an objection of attorney-client privilege bear the burden of establishing that it applies. They must make a clear showing that the asserted objection applies. Boyer v. Board of County Comm'rs, 162 F.R.D. 687, 688 (D. Kan. 1995) (internal citations and quotations omitted). To carry the burden, they must describe in detail the information to be protected and provide precise reasons for the objection to discovery. National Union Fire Ins. Co. v. Midland Bancor, Inc., 159 F.R.D. 562, 567 (D. Kan. 1994). A "blanket claim" as to the applicability of a privilege does not satisfy the burden of proof. See Kelling v. Bridgestone/Firestone, Inc., 157 F.R.D. 496, 497 (D. Kan. 1994). It is Nancy Seaba's burden to demonstrate that she is entitled to claim the privilege. Nancy Seaba should produce a dated representation agreement with the Modrall Law Firm, either redacted or for in camera review, confirming the date the alleged representation began and the relationship of that representation to this case.

II. Nancy Seaba's refusal to discuss conversations she has had with her father.

In response to McsoSystems' request that Nancy Seaba testify as to the substance of conversations she had with her father regarding her deposition or this lawsuit, Plaintiffs assert that conversations between Nancy Seaba and her father, a retired judge, are privileged. Plaintiff fails to explain how any communications Nancy Seaba had with her father regarding this lawsuit further the purpose of the attorney-client privilege. The attorney-client privilege... is to be extended no more broadly than necessary to effectuate

its purpose.” Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 196 (D. Kan. 1993). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). “[The privilege] protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.” Fisher v. United States, 425 U.S. 391, 403 (1976) (citations omitted).

Particularly in light of the fact that Nancy Seaba claims that the Modrall Firm is representing her and providing her with legal advice relevant to this lawsuit, Nancy Seaba’s conversations with her father regarding this lawsuit were not “necessary to obtain informed legal advice.”

Even a full-time practicing attorney does not imbue all confidential communications with the privilege, and in this case Nancy Seaba’s father is a retired judge. John William Gergacz, Attorney-Corporate Client Privilege, P 3.02[2][a][iv] (2d Ed. 1990). The privilege does not extend to communications not made in professional confidence. Pacific Employers Ins. Co. v. P.B. Hoidale Co., 142 F.R.D. 171, 173 (D. Kan. 1992) (citation omitted).

Nancy Seaba’s claim that her dad has “given her legal advice” does not transform the nature of the communication between Ms. Seaba and her father from conversations between family members into attorney-client privileged communications. Nancy Seaba

should be compelled to provide appropriate answers to MesoSystems' questions regarding all her conversations with her father about this case.

III. Nancy Seaba's refusal to testify as to the type and model of printer she owns.

Nancy Seaba refused to answer the question to which this motion relates regarding the brand of printer she owns on May 13, 2003. Defendant's Amended Motion to Compel was filed in this matter on July 10, 2003. MesoSystems did not "indicate its willingness to resolve this issue only in its Amended Motion to Compel," but rather protected MesoSystems right to this information as Plaintiffs had failed to provide the information and continued to delay in providing any information at the time the Amended Motion was filed. On the afternoon of July 22, 2003, Plaintiffs finally followed through on their offer to provide MesoSystems with the brand and model of Seaba's printer just before filing the Amended Response on the morning of July 23, 2003. As Plaintiffs have supplemented this response this question has been adequately addressed.

IV. Plaintiff's failure to produce all bank records of Red Path Energy in response to Defendant's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to James Seaba, Request for Production No. 16.

Plaintiffs offered to sign a release to that MesoSystems may have access to Red Path's bank statements directly from the banking institution. See Plaintiff's Response, p. 6. Plaintiffs counsel have indicated that such a release has been "forwarded to Plaintiff James Seaba, and counsel expects to have the original release signed and returned to Defendant's counsel prior to the completion of briefing." See Amended Response, p. 2. MesoSystems has not received a signed release, and briefing is complete. Should such a

signed release be forthcoming, from Plaintiffs, then this request will be adequately addressed.

V. Plaintiff's failure to produce all invoices from attorney Clinton Marrs in response to Defendant's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to James Seaba, Request for Production No. 12.

In the First Set to Phillips, Request for Production No. 11, Defendants requested "any and all billing invoices" directed to Phillips or Seaba by attorney Clinton Marrs. See First Set to Phillips, Request for Production No. 11 attached as **Exhibit C** to Defendant's Amended Motion to Compel.

In the First Set to Seaba, Request for Production No. 12, Defendants requested "any and all billing invoices" directed to Phillips or Seaba by attorney Clinton Marrs. See First Set to Seaba, Request for Production No. 12 attached as **Exhibit E** to Defendant's Amended Motion to Compel.

Although these requests for production unmistakably request "any and all" invoices, Plaintiffs now contend that MesoSystems "uses its Amended Motion to inform Plaintiffs' counsel that they seek not just the prior invoice, but rather, all invoices." See Amended Response, p. 3.

Defendant's Amended Motion to Compel was filed in this matter on July 10, 2003. MesoSystems did not "indicate its willingness to resolve this issue only in its Amended Motion to Compel," but rather protected MesoSystems right to this information as Plaintiffs had failed to provide the information and continued to delay in providing any information at the time the Amended Motion was filed. On the afternoon of July 22, 2003, Plaintiffs provided MesoSystems with a transaction list just before filing the

Amended Response on the morning of July 23, 2003. Plaintiffs continue to fail to produce the billing invoices as requested.

VI. Seaba's refusal to testify as to the substance of his communications with Clinton Marrs.

In response to MesoSystems' request that James Seaba testify as to consultations with Mr. Marrs regarding the substantive testimony Mr. Marrs has to offer that is not subject to a legitimate claim of privilege, Plaintiffs insinuate that James Seaba cannot testify regarding Mr. Marrs' substantive testimony. During MesoSystem's attorney's examination of James Seaba, he refused, without substantial justification, to respond to any questions regarding consultations with Clinton Marrs. Although Ms. Mann, James Seaba's attorney stated, "However, to the extent he [Mr. Marrs] was involved in the creation of Red Path, it seems to me he may very well have substantive testimony to offer that is not privileged." See James Seaba Dep p. 204:18-21 attached as **Exhibit H** to Defendant's Amended Motion to Compel. As the attorney-client privilege applies only to "confidential" communications with Mr. Marrs, the fact that Mr. Marrs may offer his substantive testimony as to those communications at Plaintiffs' request necessarily defeats the confidential nature of the communications. Further, Plaintiffs' counsel waived any claim of privilege, at least as it relates to Mr. Marrs' substantive testimony concerning the formation of Red Path Energy, Inc. Certainly, as Plaintiffs intend to offer Mr. Marrs' "substantive testimony" that is "not privileged," James Seaba must testify regarding the substance of any conversations he had with Clinton Marrs regarding the "not privileged" consultations.

VII. Plaintiffs refusal to pay for production by MesoSystems of computer mirror image backups.

Plaintiffs again fail to address the period during which MesoSystems expressed its willingness to produce electronic information provided that Plaintiffs pay the costs associated therewith and provided that appropriate measures were taken to preserve MesoSystems' sensitive, confidential, proprietary and privileged information contained on the computers. The protection of MesoSystems' confidential information is particularly important as Plaintiffs now work for entities that compete with MesoSystems and/or its spin-off company MesoFuel, Inc.

In light of MesoSystems bearing the cost of creating backups for use by its own experts to preserve the integrity of the laptops, Plaintiffs' failure to even respond to MesoSystems' request for an appropriate protective order, and MesoSystems production of the mirror images to Plaintiffs in good faith, Plaintiffs should remit payment in full to New Technologies, Inc. for its services in producing the backups.

WHEREFORE, Defendants pray this Court enter its order that:

- A. Nancy Seaba testify as to the substance of conversations she had with her father regarding her deposition or this lawsuit.
- B. Nancy Seaba testify as to the substance of conversations she had or witnessed involving her husband's attorney regarding her deposition or this lawsuit or produce her individual representation agreement with said attorney.

- C. Plaintiffs sign the release attached as **Exhibit G** to Defendant's Amended Motion to Compel and provide an original, fully executed release to MesoSystems' counsel so that MesoSystems may have access to Red Path's bank statements directly from the banking institution.
- D. James Scaba testify as to consultations with Mr. Marrs regarding the substantive testimony Mr. Marrs has to offer that is not subject to a legitimate claim of privilege.
- E. Plaintiffs remit payment in full for Invoice No. 10478 to New Technologies, Inc. for its services in producing requested mirror image backups of Plaintiffs' computer hard drives.
- F. Plaintiffs remit payment for MesoSystems attorneys' fees and costs in bringing this motion.
- G. Such other and further relief as the Court deems just and proper.

DATED: 07/25/03.

Respectfully Submitted:

BAUMAN, DOW, McINTOSH & LEÓN, P.C.

By


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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Defendant's Reply to Plaintiff's Response to Defendant's Amended Motion to Compel was sent via facsimile transmission to the following, on this 25th day of July, 2003.

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Angelo J. Artuso
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Alberto A. León

Ned Godshall
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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3 No. Civ. No. 02-103 LH/WWD
4 JAMES SEABA and CORY PHILLIPS,
5 Plaintiffs,
6 vs.
7 MESOSYSTEMS TECHNOLOGY, INC.,
8 Defendant.

9 DEPOSITION OF NED GODSHALL

10 April 1, 2003

11 11:13 a.m.

12 500 4th Street N.W.

13 Albuquerque, New Mexico

14 PURSUANT TO THE APPLICABLE RULES OF CIVIL
15 PROCEDURE this deposition was:

16 TAKEN BY: LISA MANN

17 Attorney for Plaintiffs

18 For the Plaintiff:

19 MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

20 500 Fourth Street, N.W.

21 Suite 1000

22 Albuquerque, New Mexico 87102

23 BY: MS. LISA MANN

24 MR. ANGELO ARTUSO

25 For the Defendant:

 BAUMAN, DCW, MCINTOSH & LEON

 Attorneys at Law

 7309 Indian School Road N.E.

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 BY: ALBERTO LEON

 CHRISTOPHER BAUMAN

 ALSO PRESENT: JAMES SEABA and CORY PHILLIPS

EXHIBIT

A

Ned Godshall
4/1/2003

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<p style="text-align: right;">Page 26</p> <p>1 with the Affidavit, we are referring to MesoSystems 2 Technology's operations in Albuquerque, New Mexico That 3 is it. 4 MS. MANN It says that. 5 A. I apologize for my lack of artistic abilities. 6 We share a facility in Albuquerque, New Mexico In 7 general this is MesoFuel and this is MesoSystems. Does 8 that help? 9 Q. So, why don't we put an Exhibit sticker on it. 10 (Exhibit 2 - DIAGRAM OF MESOSYSTEMS/MESOFUEL'S 11 FACILITY.) 12 Q. So, the document that we have now marked as 13 Exhibit 2 is your depiction, and I will accept without 14 your having told me, that you are not representing 15 yourself to be an artist or that this is drawn to scale. 16 A. Okay 17 Q. This is the office facility for MesoFuel in 18 Albuquerque, which is also an office facility, as I 19 understand it, for MesoSystems? 20 A. In part, yes 21 Q. Can I understand from Exhibit 2 that there are 22 employees for MesoFuel on one side of this little divider? 23 A. That is a physical divider. Let me do this. 24 There are offices throughout this facility And some of 25 MesoFuel's employees are on this side of the wall around</p>	<p style="text-align: right;">Page 28</p> <p>1 Mr. Godshall, as I understand it, I asked him 2 this question, is not being represented by counsel at this 3 deposition but there are, as you know, two lawyers sitting 4 here, who are, as I understand it, representing 5 MesoSystems. During the course of my questioning at this 6 deposition, I asked Mr. Godshall what he had done to 7 prepare for the deposition and we ended up discerning that 8 there had been a meeting yesterday between himself, these 9 two lawyers, the CEO for MesoSystems, which is a party, 10 and the wife of the CEO of MesoSystems. 11 I asked what was discussed at that meeting. And 12 Mr. Leon, who as I understand it, is not Mr. Godshall's 13 lawyer, instructed Mr. Godshall not to answer the question 14 on grounds of attorney-client privilege. 15 My contention is that they have made -- I asked 16 on the record if they would stipulate that MesoSystems and 17 MesoFuel are one in the same company and they refuse to so 18 stipulate. So, my contention is there can be no 19 attorney-client privilege operative here because this 20 witness is a third party witness who has made it clear he 21 is not and never has been employed by MesoSystems. And 22 that any privilege that MesoSystems might have would have 23 been breached by the presence in this discussion that I 24 want to ask Mr. Godshall about, of Mr. Godshall himself, 25 who is not employed by that company.</p>
<p style="text-align: right;">Page 27</p> <p>1 this corner. 2 Q. So, some of MesoFuel's employees actually work 3 over on the side that you have written MesoSystems on? 4 A. Again, I misspoke. I mean, I didn't think you 5 wanted that level of detail. I now will reconstruct 6 Exhibit 2. The dash line is the line of demarcation 7 between MesoSystems' employees and MesoFuel employees. 8 This wall happens to be a preexisting wall. 9 Q. Now, with respect to the question that started 10 this whole mess about MesoSystems' business records, you 11 are the person -- 12 MS. MANN. Hold on a second 13 (11:50 a.m. - Magistrate is on phone) 14 MS. MANN: We are here. 15 MAGISTRATE SCHNEIDER: What is going on? 16 MS. MANN: This is Lisa Mann and I have with me 17 -- we have a bunch of parties and witnesses here, but the 18 lawyers involved are me, we have got Alberto Leon for 19 Defendant MesoSystems, and we have also got Chris Bauman. 20 who, as I understand it, is also representing MesoSystems 21 here today. We are in a deposition of a nonparty. The 22 deposition is of a gentleman named Ned Godshall who we 23 established on the record already is president and CEO of 24 a company called MesoFuel. MesoFuel is owned, in part, by 25 MesoSystems. And I am trying to be pretty objective here.</p>	<p style="text-align: right;">Page 29</p> <p>1 So, that is the question we have before Your 2 Honor is whether there is a privilege to be asserted here 3 and whether Mr. Godshall, who I take it will follow the 4 lawyer's directions not to answer the questions, because 5 Mr. Leon assures me that he will not say anything, whether 6 there is a privilege that operates to prevent me from 7 finding out about this meeting that went on apparently for 8 some hours yesterday. 9 MAGISTRATE SCHNEIDER: Let me hear from the 10 other side. 11 MR. LEON: Your Honor, this is Alberto Leon. 12 Forgive my voice. I have a cold right now. 13 MAGISTRATE SCHNEIDER: Half the town has it 14 MR. LEON: MesoSystems Technology has a 15 substantial interest in Mr. Godshall's employer, which is 16 MesoFuel. Ms. Mann never asked the witness whether we 17 represented, No. 1, MesoSystems' interest in MesoFuel. 18 but, most importantly, she hasn't inquired as to whether 19 we represent MesoFuel which we do. Mr. Godshall was 20 called here as a fact witness. However, he is the 21 president and CEO of MesoFuel, who is also our clients. 22 All the discussion that took place yesterday 23 took place in connection with our representation of both 24 MesoSystems and MesoFuel. We do not have to stipulate 25 that they are one in the same because they are not. They</p>

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<p style="text-align: right;">Page 30</p> <p>1 are completely separate entities. It just so happens 2 MesoSystems owns an interest in MesoFuels. However, 3 everything that we discussed yesterday was privileged 4 because Mr. Godshall was president and CEO of our client, 5 MesoFuel. 6 MS. MANN: Then it would be my position that the 7 discussions between a CEO of one company and a CEO of 8 another are not made privileged by the presence of a 9 lawyer that represents them both. 10 MR. LEON: I disagree with that, Your Honor. I 11 believe they are. They are -- they were meant to be kept 12 confidential and we represent both companies and the 13 companies are related, although they are not one in the 14 same. 15 MAGISTRATE SCHNEIDER: What is the position of 16 the wife of the MesoSystems CEO? 17 MS. MANN: She is not employed by either 18 company, as I understand it. 19 MR. LEON: Just to clarify something that was 20 not brought up because the questions weren't asked, 21 Mrs. Call was there at the meeting for a short period of 22 time. She was not there for the whole meeting. She was 23 already deposed this morning and she answered every 24 question that she knew with respect to her factual 25 knowledge about this matter, but she was only there for a</p>	<p style="text-align: right;">Page 32</p> <p>1 concluded.) 2 Q. (By Ms. Mann) Why don't you tell me about that 3 meeting yesterday. 4 A. What would you like to know? 5 Q. I would like to know everything that was said. 6 A. I don't think I can do that verbatim. 7 Q. Do your best. 8 A. Okay. I came in and I said hello. I'll try to 9 get it in chronological order. I came in and said hello 10 and Mr. Leon said hello back. We made introductions. 11 Everybody introduced themselves. 12 Q. Let me stop you right there. Was there anybody 13 at this meeting that you had not previously met? 14 A. No. 15 Q. Continue. 16 A. With what? 17 Q. With the rest of your recitation of what was 18 said at that meeting. 19 A. Okay. Because I hadn't finished my first 20 answer. 21 Q. Okay. 22 A. And then Mr. Leon told us about depositions, 23 told us what to expect today. 24 Q. Okay. What did he tell you? 25 A. He told us there would be a court reporter</p>
<p style="text-align: right;">Page 31</p> <p>1 very brief period. She was not there for the whole 2 meeting so she was not privy to any privileged 3 communications that took place regarding MesoFuel or 4 MesoSystems. 5 MAGISTRATE SCHNEIDER: Well, off the top of my 6 head, I have one little question in the back of my mind 7 and that is the whole issue of sort of jointly 8 represented, you know, Defendants or parties. And in this 9 case, of course, one of these is not a party. 10 MS. MANN: Right. 11 MAGISTRATE SCHNEIDER: I am having trouble 12 seeing, where there is no allegation that these two are, 13 in fact, one in the same, because one of them is a 14 wholly-owned subsidiary, it would seem to me that if they 15 are both corporations, separate, distinct under the law, 16 and not wholly-owned by the other, then it would seem to 17 me that when they have a meeting, the fact they have the 18 same attorney, doesn't give them both the attorney-client 19 privilege for that particular meeting. 20 MS. MANN: That is my position. 21 MAGISTRATE SCHNEIDER: That is what I am going 22 to rule. You can inquire into everything that was said. 23 MS. MANN: Thank you, Your Honor. 24 MAGISTRATE SCHNEIDER: Thank you all. 25 (Conversation with Magistrate Schneider</p>	<p style="text-align: right;">Page 33</p> <p>1 sitting in the room, would be transcribing everything that 2 was said. Told us that one or more attorneys would be 3 asking each of us questions. Specifically instructed us 4 to be sure to answer every question factually, truthfully 5 and as completely, to the best of our ability, as we 6 could. 7 Q. Anything else about the deposition process that 8 Mr. Leon told you about? 9 A. Not that I remember at this time, but, I am 10 trying to summarize for you. I assume that for a two hour 11 meeting, even if I could, you wouldn't want a 12 transcription that would take two hours to recite, not 13 that I could do that. 14 Q. I have all day. 15 A. Okay. Again, I have answered the best I can. I 16 would be happy to answer anymore specific questions that 17 you may have. 18 Q. Okay. So, you went through what the deposition 19 is about? 20 A. Right. 21 Q. And then what did you discuss next? 22 A. At that point, I believe, Tina Call, Mrs. Call 23 left. And then we discussed the order of the depositions 24 this week. Let's see, what else? Give me a second. I am 25 trying to remember what else we did talk about. We talked</p>